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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 461st MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 25 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 12 (continued)

1. Mr. CONOBOY (United Kingdom), referring to his Government's proposal for an amendment to article 12 (A/CN.9/347, p. 62, para. 27), said that the article as drafted might imply that there would be a duty to assist only when the credit transfer mechanism broke down. Replacing the words "if the credit transfer is not completed" by the words "until the credit transfer is completed" would make it clear that there was a continuous duty to assist which was distinct from the money-back guarantee.

2. Mr. ADEDIRAN (Nigeria) said that the proposed amendment might not cover a situation involving the recovery of money when a credit transfer had to be aborted.

3. The CHAIRMAN explained that article 12 concerned the duty of all parties to assist in completing a credit transfer.

4. Mr. DE BOER (Netherlands) supported the proposed amendment, since it was in keeping with the intention of the article.

5. The proposal was adopted.

6. The CHAIRMAN announced that the proposal made by Japan (A/CN.9/347, p. 37, para. 12) had been withdrawn on the understanding that its substance was implicit in the article as drafted.

7. Mr. FELSENFELD (United States of America) said he understood that article 12 was generally acceptable to the Commission. His delegation, however, objected to the article, on the ground that it imposed on each receiving bank an obligation to assist the originator and each subsequent sending bank, whereas it was normal banking practice for a receiving bank to assist only the bank that sent a transfer to it and the bank to which it in turn sent that transfer. The duty to assist should therefore be confined within those limits. There was also the question of the penalty to be imposed for violation of the obligation which the article laid down.

8. The CHAIRMAN said that the question of liability might be discussed under article 16.

9. Mr. FELSENFELD (United States of America) said that the principal point at issue was whether the obligation should exist only towards the party sending the transfer.

10. Mr. SCHNEIDER (Germany) said that the article as drafted left room for interpretation regarding the party to whom the duty was owed and his right to ask for assistance. That was also true in regard to liability for any legal costs which might arise.

11. Ms. GOLAN (Observer for Israel) shared the United States view that the article should reflect normal banking practice and not impose new obligations on the parties. She suggested that the term "obligated" might be amended in such a way as to eliminate the implication that a contractual obligation existed.

12. Mr. FELSENFELD (United States of America) said that he would have difficulty in accepting the view expressed by the German representative, which seemed to indicate that a party would be obligated without the creation of an obligation.

13. The CHAIRMAN suggested that the wishes of the observer for Israel might be met if the provision referred to a duty instead of an obligation.

14. Mr. FELSENFELD (United States of America) welcomed that suggestion.

15. Mr. ERIKSSON (Observer for Sweden) said that the article must take into account the interests of parties other than banks. The rule as it stood favoured the originator. He shared the United States view that it was necessary to define the consequences of a breach of the duty which the article laid down. He approved the text as it stood.

16. Mr. CRAWFORD (Canada) said that the differing approaches of the United States and the German delegations to the issue of the nature of the obligation might stem from differences between civil law and common law. Under civil law, the duty would be similar to a legal norm and therefore less onerous than in a common law jurisdiction, where it would be considered a statutory duty, the breach of which would be a tort.

17. In response to the suggestion made by the observer for Israel, he proposed that the words "obligated to assist" in the second line of the text should be replaced by the words "obligated to use its best efforts to assist". That change, he thought, would address the problem in terms of a norm rather than a legally enforceable duty and would suggest a reasonable content of the duty.

18. Mr. SOLIMAN (Egypt) said that it would be inappropriate for the article to refer to an obligation, particularly in view of the absence of an attendant penalty. He proposed that the provision should refer to cooperation for the purpose of assistance.

19. Mr. ABASCAL ZAMORA (Mexico) said he believed that the idea that a bank should use its best efforts to assist a party would not satisfy some delegations. Since sanctions were to be attached to many provisions of the draft, it was desirable to postpone consideration of the wording until sanctions were clearly defined under article 16. A difficulty in establishing some sanctions was due to the fact that the Model Law was based on fluctuating interests, which could pass from one party to another; no real parameters existed for assessing the duty to assist, for example.

(Mr. Absacal Zamora, Mexico)

20. The Commission should address the problem of the different interpretations which a civil law jurisdiction and a common law jurisdiction might place on article 12. In his view, article 12 stated who bore the obligation, so that the obligation would stem from the Model Law and not from a contract.

21. Mr. BONELL (Observer for Italy) supported the Chairman's suggestion that the provision should refer to a duty to assist. It should be incorporated in the Model Law in that form. The interpretation of the duty should be left to the applicable law. It would be impractical for the article to attempt to identify all the possible beneficiaries of the duty, or to define in detail notions such as using best efforts.

22. Mr. KOMAROV (Union of Soviet Socialist Republics) said that article 12 was generally satisfactory. To some extent it reflected existing banking practice, since banks cooperated in an attempt to assist their customers when difficulties arose. Perhaps the title of the article or the way the obligation was described should be changed. It was necessary to balance a bank's obligations against the flexibility existing in current banking practice. The Canadian proposal concerned the criteria to be used in measuring the scope of the duty and it deserved consideration. Banks should be bound to assist parties to a reasonable extent within the normal range of banking practice.

23. Mr. BURMAN (United States of America) welcomed the approach taken by the representative of the Soviet Union, who had emphasized the cooperation which existed in the banking system. Unlike the representative of Italy, he himself thought that it was important for article 12 to define the obligations and beneficiaries involved. Assistance could comprise many services that might entail large amounts of money being spent on a credit transfer which was for a small amount. It would be unwise for the Model Law to create unlimited legal obligations in article 12 after having prescribed strictly limited obligations in respect of prior stages of a credit transfer.

24. The CHAIRMAN wondered whether the concerns of the delegation of the United States of America might be mitigated if it were understood that article 12 constituted a statutory obligation, not a contractual one. In that case, perhaps, liability for damages would be excluded by the provisions of article 16(8).

25. Mr. BURMAN (United States of America) said that when countries adopted the Model Law, they would do so on the advice of banking supervisors. The article under discussion would not be adopted if there was no legal penalty for a breach of the obligation which it laid down. First, however, it was necessary to define the nature of the obligation, and who was obligated to whom.

26. U NYI NYI THAN (Observer for Myanmar) supported the proposal made by the representative of Canada. It represented a wise compromise in view of the fact that the Model Law was intended to cover banking world-wide.

27. Mr. ADEDIRAN (Nigeria) said that the Model Law should not impose obligations on banks that they would be unable to discharge. Thinking in terms of the Canadian proposal, he believed that for as long as the credit transfer was not completed, banks should be enjoined to use their best endeavours to assist in completing it. That would be the best outcome from the originator's point of view.

28. Mr. BONELL (Observer for Italy) agreed with the United States delegation that a duty without a sanction might prove unacceptable. Although it was a somewhat unusual situation, there were precedents for it in international instruments. For example, the recently concluded United Nations Convention on the Liability of Operators of Transport Terminals in International Trade focused primarily on liability for loss or damage to goods. In addition, however, it laid down ancillary duties aimed at achieving a balance between the parties, such as the duty to assist in tracing lost goods. It had not been possible to define that duty in detail, but its inclusion in the Convention had nevertheless been felt to serve a useful purpose. He thought that in the present case the Canadian proposal to mention best efforts was a fair compromise.

29. Mr. BOSSA (Observer for Uganda) said that the obligation to assist was already implicit in the various obligations existing between the parties under other articles of the Model Law. He therefore wondered if article 12 was really needed.

30. Mr. PARKER (Observer for Australia) said that article 12 clearly defined the parties to whom and by whom a duty was owed, namely the originator, subsequent banks and the next receiving bank. To some extent, he shared the concerns of the United States delegation regarding the extent of the duty. In his view, the key to the provision lay in the words "in completing the credit transfer". The duty was thus limited to carrying out normal banking procedures. In order to make the scope of the obligation quite clear, that phrase might be expanded to read "in completing the banking procedures of the credit transfer".

31. The CHAIRMAN suggested that article 12 might be approved on the understanding that it laid down a statutory obligation, and that the following changes might be made to it in order to clarify the way in which the Commission understood it: first, the reference to an obligation to assist would be replaced by a reference to a duty to assist, thus attenuating the force of the requirement; secondly, the suggestion of the observer for Australia to refer explicitly to banking procedures would be implemented, thus limiting the scope of the duty.

32. Mr. BURMAN (United States of America) said that the Chairman's suggestion went a long way towards accommodating his delegation's concerns, but its basic objection to the article remained.

33. The CHAIRMAN invited the Commission to approve article 12 on the basis he had just suggested, with the wording being left to an informal drafting group which would include the representative of the United States of America and the observer for Australia.

34. It was so decided.

Article 10 (continued)

Article 10(1) (A/CN.9/XXIV/CRP.6)

35. The CHAIRMAN invited the Commission to consider the proposal which Switzerland and the United States had made for article 10(1) in document A/CN.9/XXIV/CRP.6. The proposed wording was intended to give effect to the delicately balanced decision taken by the Commission at its 452nd meeting (A/CN.9/SR.452, para. 32) that while same-day execution of payment orders should be a basic principle of the Model Law, a day's grace might be accorded to banks unable to comply with that rule.

36. Mr. GRIFFITH (Observer for Australia) submitted that the understanding which the Commission had reached would be reflected more accurately by words to the effect that the receiving bank was required to execute the payment order, if reasonably practicable to do so, on the business day it was received, or otherwise on the business day after receipt. In his view, the text under consideration gave the misleading impression that first-day execution was no more than an option.

37. The CHAIRMAN said that the Commission had been at great pains to avoid the use of terms, such as "reasonable", which could give rise to differences of interpretation or suggest a requirement of justification. His own understanding was that the Commission had agreed that while first-day execution should - as he had said - be the general rule, execution on the following day would be possible without sanctions. Perhaps the concerns of the observer for Australia might be met through the insertion of the words "in principle" after the words "payment order".

38. Mr. GRIFFITH (Observer for Australia) said that he would prefer the insertion of the word "normally" at that point.

39. In response to a comment made by Mr. ABASCAL ZAMORA (Mexico), the CHAIRMAN said that any imprecision in the draft in regard to the use of the terms "banking day" and "business day" would have to be resolved by the Drafting Group.

40. Ms. KOSKELO (Observer for Finland) suggested that the insertion in the text of the joint proposal of the word "feasible" after the words "if not" might meet the concern expressed by the observer for Australia.

41. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation would be unwilling to endorse the Finnish suggestion, since to introduce the notion of feasibility would bring with it the need to consider where the burden of proof lay, as well as the risk of challenge or even litigation when first-day execution did not take place. His preference was for the text proposed by Switzerland and the United States of America.

42. Ms. JAMETTI GREINER (Observer for Switzerland), supported by U NYI NYI THAN (Observer for Myanmar), favoured the inclusion of a reference to principle rather than feasibility.

43. Mr. BOSSA (Observer for Uganda) suggested that if the basic understanding was that the delay in execution should under no circumstances exceed two days, the text might read: "The receiving bank is required to execute the payment order on the business day it is received but in any case not later than the following business day."

44. The CHAIRMAN asked whether, in the light of the discussion, the Commission could endorse the following wording: "The receiving bank is required to execute the payment order in principle on the business day it is received or, if not, at the latest on the business day after it is received, unless ...".

45. Mr. CRAWFORD (Canada) wondered whether the principle itself might not be reinforced by making it the subject of a shorter sentence, which would be followed by a second sentence setting out the attendant liabilities or obligations.

46. The CHAIRMAN said that in the absence of any objection, he would take it that the Drafting Group might be entrusted with the preparation of a revised version of the joint proposal for article 10(1) in document A/CN.9/XXIV/CRP.6; and that at an appropriate place in the text, without any modification of the substance of the provision, the notion of principle might be inserted.

47. It was so agreed.

Article 10(1)(bis) (A/CN.9/XXIV/CRP.6)

48. The CHAIRMAN invited the Commission to consider the second part of the proposal in document A/CN.9/XXIV/CRP.6. It called for the draft to contain an article 10(1)(bis) according to which, irrespective of the day of execution of the payment order, value must be given as of the date of receipt of the order. He himself, in the interests of clarity, suggested that the final phrase of the proposed text might read: "... the receiving bank must account for value as of the date of receipt".

49. Mr. ABASCAL ZAMORA (Mexico) said that, at least in the Spanish version, the final part of the proposal was unintelligible. He asked whether it should not refer to interest rather than to value.

50. The CHAIRMAN said that the problem alluded to by the previous speaker was probably one of translation.

51. Mr. BERGSTEN (Secretary of the Commission) remarked that the point raised by the representative of Mexico had substantive connotations. The words "value" and "interest" were not simply interchangeable; for example, the question of reserve requirements might be involved.

52. Mr. MORAN BOVIO (Spain) agreed that the matter was more than one of mere drafting. He believed that he was not alone in wondering whether the provision for the establishment of value on the date of receipt was not related to the calculation of interest for the period which might elapse between receipt and transmission.

53. The CHAIRMAN said that the proposal was intended to ensure - no more and no less - that if the beneficiary's bank delayed executing a payment order until the day following receipt, the beneficiary would be credited as of the date of receipt. The question whether interest would accrue to the beneficiary would depend on the relationship between the beneficiary and the beneficiary's bank.

54. Mr. AL-NASSER (Observer for Saudi Arabia) suggested, on the basis of the Arabic version, that a generally acceptable wording might be: "The receiving bank must execute the payment order on the basis of its value on the date of receipt even if it does so on the day following receipt."

55. Mr. GRIFFITH (Observer for Australia) asked whether the text before the Commission implied that one day's interest would be payable.

56. The CHAIRMAN said he believed that in ordinary cases that might be so.

57. Mr. GREGORY (United Kingdom) submitted that the reply to the question would depend on whether or not an interest-bearing account was involved.

58. Mr. GRIFFITH (Observer for Australia) said it was his understanding that the Commission's original intention had been to provide for a default consequence for the day's delay; the provision would be largely meaningless if that consequence, in the form of an obligation to pay interest, arose only when an interest-bearing account was involved.

59. The CHAIRMAN said that there had been no question of imposing a penalty. It was simply the expectation of the Model Law that, since the subject-matter of the transfer had been received, it must be credited at its value on the day of receipt. One reason for that was to avoid difficulties which might arise from the dating of a cheque drawn by the beneficiary. The Model Law did not address the question of interest.

60. Mr. BERGSTEN (Secretary of the Commission) remarked that although article 10(1) now required the beneficiary's bank to execute a payment order by the day after receipt at the latest, he doubted whether that had been the Commission's specific intention. Article 9(1) stipulated that the beneficiary's bank must place the funds at the disposal of the beneficiary in accordance with certain conditions, but it said nothing about the time for doing so. That omission had of course been deliberate, because it was an essential part of the policy underlying the Model Law that it should not go into the relationship between the beneficiary's bank and the beneficiary. While that policy had been breached on a number of occasions, and for very good reasons, one of the questions deemed to lie completely outside the purview of the Model Law was that of the moment when the credit had to be placed at the disposal of the beneficiary: that was a matter which lay at the heart of the relationship between the beneficiary and the beneficiary's bank. Consequently, while agreeing in great measure with the Chairman's analysis of the words before the Commission, he could not concur with his conclusions as to what they were intended to convey.

Article 6 (continued)

Article 6(3) (A/CN.9/XXIV/CRP.7)

61. Ms. KOSKELO (Observer for Finland) asked how the text proposed for article 6(3) would affect the provisions concerning deemed acceptance in article 6(2). What did the extra day allowed for giving notice of rejection imply for the benefit that a bank might derive from the "float"? If a bank knew that it would always benefit from the "float" it would probably be inclined to ignore article 10(1) and rely on the rules governing deemed acceptance.

62. Mr. GREGORY (United Kingdom) pointed out that the Drafting Group had decided that the opening words of article 6(2)(a) as reproduced in the Working Group's text (A/CN.9/344) should be amended to read: "when the time for giving notice of rejection under paragraph (3) has elapsed without notice having been given".

63. The question of "float" was a substantive issue which he believed related to article 10(1)(bis). It did perhaps require further consideration but it should not affect article 6(3).

64. Mr. CRAWFORD (Canada) said that the question of "float" was a complicated subject. The Commission should, he believed, focus on the one aspect of it which the Model Law should address, namely the time value of funds in the banking system which were known by that name. As he understood it, the Commission had decided that a bank should not be permitted to derive benefit from the "float" by delaying execution of a payment order. That was the only point the Commission should deal with; the question whether an account showed a credit or a debit balance or whether it was interest-bearing was irrelevant.

65. Ms. KOSKELO (Observer for Finland) suggested that it might be advisable to include a new provision in article 10 stipulating that a payment order must be executed in the event of deemed acceptance, so as to prevent banks from drawing benefit from the extra day granted for execution.

66. Mr. GREGORY (United Kingdom) agreed.

67. The CHAIRMAN suggested that the Drafting Group might prepare a text for that purpose.

68. Mr. SCHNEIDER (Germany) said that the allocation of "float" was a very important question which affected not only article 10 but other parts of the Model Law - the provisions regarding rejection of payment orders, for example. He wondered whether the proposed new provision should not be a separate article rather than simply an addition to article 10.

69. The CHAIRMAN pointed out that some of the provisions of article 16 already related to "float" and that a new proposal for parts of that article had been put forward in document A/CN.9/XXIV/CRP.10.

70. Ms. KOSKELO (Observer for Finland) said she believed that, as far as rejection of a payment order was concerned, the matter would be covered by article 13(1).

71. Mr. MORAN BOVIO (Spain) shared the views expressed by the German representative. It seemed to him that the whole question of float required further investigation.

72. Mr. SCHNEIDER (Germany) pointed out that article 13 referred to the originator's bank. He reiterated his view that it would be best to group all provisions concerning the allocation of "float" in a single article.

The meeting rose at 12.45 p.m.

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Twenty-fourth session

SUMMARY RECORD OF THE 462nd MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 25 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 12 (continued)

Article 6 (continued)

Article 7 (continued)

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Article 17

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The meeting was called to order at 2.12 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 12 (continued)

1. The CHAIRMAN said that the Australian delegation had provided a new wording for the last five words of the article, which was acceptable to the United States delegation. The paragraph would accordingly end with the words: "... in completing the banking procedures of the credit transfer."

2. If he heard no objection, he would take it that the Commission wished to approve article 12, as thus amended.

3. It was so decided.

Article 6 (continued)

Article 6(4) (continued) (A/CN.9/XXIV/CRP.7)

4. Mr. GREGORY (United Kingdom) said that the words "is cancelled", in the first line of the ad hoc drafting group's proposal (A/CN.9/XXIV/CRP.7), should be revised to read "ceases to have effect".

5. Mr. VASSEUR (Banking Federation of the European Community) said that, on the basis of the French version of the proposal, he could see no reason for the change.

6. The CHAIRMAN explained that, in other parts of the Model Law, reference was made to revocation and cancellation. The change was intended to avoid confusion.

7. Mr. FELSENFELD (United States of America) said that he had a small comment on the language of article 6(4), as it appeared in A/CN.9/XXIV/CRP.7. He understood that some further changes had been made by the ad hoc drafting group and would assume that they were being taken into account.

8. Mr. GREGORY (United Kingdom) said that, while the reference to the period being determined by law, agreement or rule of a fund's transfer system seemed to embody the Commission's thinking, the second sentence of the paragraph seemed to call for a policy decision by the Commission.

9. Mr. BERGSTEN (Secretary of the Commission) said that, when the words "before the expiry of any period determined by law" had been discussed, it had been assumed that no one knew of any law other than the Model Law and, possibly, article 4A of the Uniform Commercial Code which would cause the payment order to be cancelled after such a short period of time. If there was no such similar law, a statute of limitation or prescription would apply but the period would run not for days but for years. Variation by agreement was already dealt with in article 3.

(Mr. Bergsten, Secretary of the Commission)

10. It had been acknowledged in the drafting group that the question of the rule of a funds transfer system was somewhat different, but the group had not been sure exactly how it went beyond an agreement. In any case, there had been a feeling that the presence of the words "law, agreement" etc. served no useful purpose. The drafting group had therefore agreed on some further changes, whereby the new proposed text would read "A payment order is cancelled if it is neither accepted nor rejected under this article on the fifth banking day before the close of business following the latest day the order was required to be executed." The text in question would shortly appear in document A/CN.9/XXIV/CRP.5/Add.2.

11. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve the text of article 6(4), as orally revised by the Secretary, on behalf of the drafting group.

12. It was so decided.

Article 7 (continued)

Article 7(5) (continued) (A/CN.9/XXIV/CRP.8)

13. Mr. GREGORY (United Kingdom) said that the ad hoc drafting group's discussions had not gone beyond the first sentence of the paragraph, since the remainder could not be finally drafted until points of policy had been resolved.

14. Mr. CRAWFORD (Canada) said he noted the use of the lengthy expression "the latest day the order was required to be executed ..." in articles 3 and 4. He thought it would be needed again in article 7(5), since a reference merely to the time required by article 10 would be incomplete.

15. What the Commission would have to face was the fact that it had created a period during which execution, though proper, was not required unless the bank decided to accept the payment order. He wondered whether there would be any objection to asking the Drafting Group to find an expression such as "execution period", complete with a definition, to simplify the communication of a basically very simple idea.

16. Mr. GREGORY (United Kingdom) said he doubted whether the plenary meeting was the appropriate place to discuss such technical drafting questions. On the point raised by the Canadian representative, however, he pointed out that the expression in the third line of the proposed text: "time required under article 10" was a reference to article 10(2) and not to article 10(1).

17. Mr. SCHNEIDER (Germany) said he would like some clarification of the effect of the change made to article 7(5) on detection. In particular, he wished to know what would happen if a bank acted negligently and did not detect inconsistency.

18. The CHAIRMAN said that the change had come about because, when the notion of detection had been introduced by the delegation of the United Kingdom in article 7(3), subsequently deleted, the word "detects" was held to entail no obligation. The discussion and subsequent drafting had therefore proceeded on the basis that failure to detect was not negligence, and it had been agreed that the same technique should be used with regard to article 7(4) and (5).

19. He noted that there was general agreement on the first sentence of article 7(5), as drafted by the United Kingdom representative, and asked the Commission whether, since the first sentence of article 9(4) was substantially the same, he might take it that that, too, was approved.

20. It was so decided.

21. Mr. FELSENFELD (United States of America) said that the desire to accommodate varying views among the delegations on what the Law should provide had led to one compromise after another.

22. From the outset, his delegation had been concerned at a tendency to concentrate unduly on the concept of consumer-related and lower-speed transfers, entailing higher costs, rather than on the type of high-speed, low-cost, electronic transfers that had come into general use. It firmly believed that the burden on receiving banks should be kept as low as possible so as to enable them to execute high-speed, low-cost transfers for the small charges that had become so acceptable and agreeable to the business community. Every burden on the receiving bank necessarily slowed down transactions and increased costs.

23. The first sentence of article 7(5), as redrafted, placed an obligation on the receiving bank to give notice of an inconsistency if it detected one. That in itself was already a compromise but it was a compromise with which his delegation could live. It would not unduly upset high-speed transfers, although it would tend in that direction. Nevertheless, violation of the obligation to give notice carried a penalty, and he was sure that that would give rise to further discussion later on.

24. Subject to more thorough study, he thought agreement might be reached on the third and fourth sentences; the second sentence went too far, however, and was completely unacceptable to his delegation.

25. Mr. DE BOER (Netherlands) suggested that the objections of the United States delegation could be met by retaining the first sentence only. The aim should be to combine consistency with practicality. It should be remembered that an error, including a discrepancy, might be dealt with under article 4.

26. The CHAIRMAN said that the last sentence of article 7(5) was in keeping with a substantive decision of the Commission, which clearly indicated that the detection element would not extend to fraud and thus would take care also of the concern voiced by the representative of Germany.

27. Mr. CRAWFORD (Canada) said that, in effect, the second sentence of the paragraph allowed a person executing a mandate to choose which part of that mandate he would execute, namely, whether to pay the sum recorded in figures or in words, and thus to pay a greater or lesser amount. The sentence thus offered too little guidance, but he had difficulty in agreeing with the United States delegation that it should be deleted because of its unsuitability for high-speed transfers.

28. Mr. GREGORY (United Kingdom) said that the third and fourth sentences might be sufficient to take care of the problem.

29. Mr. SCHNEIDER (Germany) said that his delegation had a fundamental objection to the last sentence, which failed to distinguish between degrees of inconsistency, some of which might be glaring while others might be much harder to detect. The sentence should either be deleted or reformulated.

30. Mr. DUCHEK (Observer for Austria) said that he understood the hesitation expressed by the representative of Germany and the arguments put forward by the Canadian representative. In his view, the current text of article 7(5) would create a very unsatisfactory regime.

31. The CHAIRMAN said that it had been agreed at a previous meeting not to touch upon the question of responsibility for detection. Article 7(5) related merely to the fact of the detection, not to the scale of the inconsistency.

32. Mr. FELSENFELD (United States of America) said that the proposed text of the last sentence of the article was of comparatively recent date, and its implications had not been considered in depth. He suggested that it should be deleted.

33. The CHAIRMAN suggested that the best solution might be to adopt article 7(5), as contained in document A/CN.9/XXIV/CRP.8, the second and fourth sentences being deleted.

34. It was so decided.

Article 9 (continued)

Article 9(4) (continued) (A/CN.9/XXIV/CRP.9)

35. Ms. KOSKELO (Observer for Finland) said that her delegation had some difficulty with the last sentence of article 9(4) in the text proposed by the United Kingdom representative, since it was not consistent with paragraph 1 of the article, to which it referred. She accordingly suggested that it be deleted.

36. Mr. FELSENFELD (United States of America) and Mr. DE BOER (Netherlands) agreed with the suggestion by the observer for Finland that the last sentence of the paragraph should be deleted.

37. Mr. DUCHEK (Observer for Austria) said that the need to make progress in adopting the draft articles should not preclude a thoroughgoing discussion of their substance, particularly since the Commission was unlikely to complete its work at the current session.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 9(4), as contained in document A/CN.9/XXIV/CRP.9, the last sentence being deleted.

39. It was so decided.

Article 11 (continued)

Article 11(6)(bis) (continued)

40. MR. CONOBOY (United Kingdom) said that, with the help of the United States delegation, he had drafted a revision of the wording for a new article 11(6)(bis) originally proposed by his Government (A/CN.9/347, p. 61). The new paragraph would read:

> "A bank that is obliged to make a refund to its sender under paragraph (5) is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent. This paragraph does not apply to a bank if it would affect the bank's rights or obligations under any agreement or rules of a funds transfer system."

41. The proposed wording could apply equally well to article 13, perhaps with minor drafting changes to reflect the context.

42. Mr. SCHNEIDER (Germany) said he wondered why, in the United Kingdom proposal, the originator was not given a direct claim on the intermediary bank so that he would have the right to bring an action against the intermediary in cases of insolvency. Since all were agreed that the funds should go back to the originator, the latter should have a direct claim.

43. Another reason for including such a provision was to start the process of defining the term "deposit", in connection with the insurance deposit scheme, discussion of which would shortly begin in another forum.

44. Mr. ADEDIRAN (Nigeria) said he supported the German proposal.

45. Mr. FELSENFELD (United States of America) said he also supported that proposal. In a bankruptcy situation, a skip payment would be facilitated if there could be a direct claim by the originator.

46. The CHAIRMAN suggested that the representatives of Germany, the United States and the United Kingdom should be invited to draft a text for addition to the one orally proposed by the representative of the United Kingdom.

47. It was so agreed.

48. The CHAIRMAN invited comments on article 11(8). The Drafting Group should be asked to deal with the drafting proposals that had been made regarding that paragraph. Since, however, according to the definitions, "sender" included "originator", the words "or the originator" might be deleted.

49. Mr. BERGSTEN (Secretary of the Commission) said that, while it was true that the originator was a sender, the word "originator" in article 11(8) had a different connotation. If the sender involved was the sender between the second and third intermediary banks, the originator died before completion of the credit transfer, and all the banks implementing the credit transfer were agents or sub-agents of the originator, the agency would die when the principal died. The word "originator" should therefore be retained, since it would make it clear that death, bankruptcy or incapacity did not terminate any authority, however the relationship between an intermediary bank and the originator was characterized.

50. The CHAIRMAN withdrew his suggestion.

51. Mr. CRAWFORD (Canada) said that that interpretation would be reinforced by amending the second line of the paragraph to read "... operate to revoke a credit transfer or payment order".

52. Mr. GREGORY (United Kingdom) said he was not sure that the concept of revoking a credit transfer existed.

53. Mr. VASSEUR (Banking Federation of the European Community) said that the term "revoke" in paragraph 8 was an inappropriate one, since article 11 envisaged revocation as an initiative on the part of the sender. No initiative was involved in death, bankruptcy or incapacity, and paragraph 8 should therefore refer to "expiry".

54. Referring to the definition of the word "bankruptcy" in the second sentence of the paragraph, he suggested that, since entities other than individuals and companies could be declared bankrupt, the wording ought to be "The word 'bankruptcy' includes all forms of insolvency whether they affect legal or physical persons".

55. The CHAIRMAN said that he thought that the meaning of "revoke" was clear and that the first sentence of paragraph 8 did not need to be changed. The second point made by the observer for the Banking Federation of the European Community would be considered by the Drafting Group.

56. Article 11(8) was approved, subject to possible amendment by the Drafting Group.

57. The CHAIRMAN invited comments on article 11(9).

58. Ms. KOSKELO (Observer for Finland) said she considered that the paragraph in question was too broadly worded. Its application should be limited to article 11(1) and (2).

59. Mr. CRAWFORD (Canada) said that the concept of branches as separate banks ought to apply to paragraphs 5 and 6 of the article also.

60. Mr. GREGORY (United Kingdom) said he fully agreed. He wondered, however, if the paragraph might not be acceptable as it stood on the understanding - already expressed - that the reference in the Model Law to branches and separate offices of a bank was not intended to convey any implication concerning the relationship between a branch and its head office, and that any question of financial liability that might exist between them was not of concern to the Model Law.

61. Article 11(9) was approved.

Article 17

62. The CHAIRMAN invited the members of the Commission to comment on paragraph 1 of article 17 and reminded them of the fact that the first sentence of the paragraph constituted the basis on which the Commission had discussed other issues.

63. The Commission would have to decide whether or not to retain the second sentence, which should be considered in the light of article 9(1).

64. Ms. KOSKELO (Observer for Finland) said that it should be made clear in the first sentence that the transaction was completed when the beneficiary's bank accepted a payment order for the benefit of the beneficiary designated in the originator's payment order.

65. The CHAIRMAN recalled that, in the discussion on articles 13 and 14, he had indicated that the Commission would proceed on the assumption that, whether or not there was an error in transmission, the time of acceptance was when a certain sum was accepted by the beneficiary's bank.

66. Mr. ADEDIRAN (Nigeria) said he agreed with the observer for Finland. There were situations in which a credit transfer might have been completed in accordance with article 17(1), but was not completed from the point of view of the originator. Wording should therefore be included to make it clear that a transfer was not taken to be completed until it was completed in accordance with the content of the payment order sent by the originator.

67. Ms. KOSKELO (Observer for Finland) said that her suggestion was designed for the situation in which, through some mistake during the credit transfer, the payment order which reached the beneficiary's bank indicated a beneficiary other than the one designated by the originator. In that case, the transfer should not be regarded as having been completed and article 13 should also apply.

68. Mr. LIM (Singapore) said that the word "completion" could mean different things to different people. He had initially thought that the word meant the discharge of the obligation. However, as things stood, he realized that it related only to the credit transfer itself and not to the discharge of the

(Mr. Lim, Singapore)

obligations of the parties in the credit transfer. That was a point that ought to be made clear in the article, lest it be thought that it also meant that all obligations had been discharged.

69. The CHAIRMAN said that paragraph 1 of article 17 was concerned with a credit transfer while paragraph 2 of the article referred to the discharge of an obligation.

70. Mr. YIN Tieou (China) said that a credit transfer originated with the originator and ended when the beneficiary received the funds. The wording of article 17(1) was not consistent with that definition, however, because it did not include the entire process. His delegation therefore supported the views of the representative of Nigeria and the observer for Finland.

71. Mr. AL-NASSER (Observer for Saudi Arabia), referring to the point raised by the observer for Finland, said that, in his experience, a credit transfer was always made by name.

72. Mr. FELSENFELD (United States of America), referring to the Finnish observer's statement, said he agreed that, where the payment order accepted by the beneficiary's bank was not to the credit of the beneficiary designated by the originator, the transfer should not be regarded as complete.

73. With respect to the point made by the representative of Nigeria, he said that, if the payment order was for a lesser amount than that specified by the originator, the credit transfer should be regarded as complete to the extent of the payment. In that regard, a sentence could be included in paragraph 1 stating that a credit transfer was completed to the extent that payment had been made.

74. With regard to the statement by the representative of Singapore, he wished to point out that paragraph 1 dealt only with the completion by the banking system of the credit transfer. Paragraph 2 concerned the discharge of obligation.

75. In response to the point raised by the representative of Singapore, Mr. CRAWFORD (Canada) said that, according to the Secretariat's comments (A/CN.9/346, p. 90), the credit transfer was completed when the beneficiary's bank accepted the payment order. The concept of completion meant that the payment order had reached the proper place at the proper time, but not necessarily in the proper amount.

76. In order to make it clear that the payment order had reached the right place and was also in the proper amount, a phrase such as that appearing in article 7(2) "consistent with the contents of the payment order" might, perhaps, be included in the paragraph under consideration. It might also be possible to delete the second sentence of article 17(1), which had nothing to do with the issue of time.

77. Mr. ABASCAL ZAMORA (Mexico) said that the purpose of article 17 was to establish the moment at which the credit transfer was completed and the transfer process ended. There was no reason for confusion with regard to the discharge of obligation. Paragraph 2 made express reference to those cases where the credit transfer was for the purpose of discharging an obligation of the originator to the beneficiary that could be discharged by a credit transfer to the account indicated by the originator.

78. The applicable law determined the moment of payment, which was when the beneficiary's bank accepted the payment order. He therefore saw no need to introduce any substantive changes into the article, and thought that any difficulties could be dealt with by the Drafting Group.

79. Mr. AL-NASSER (Observer for Saudi Arabia) said he thought that the point raised by the representative of Singapore could be met by replacing the second sentence of paragraph 1 by the following text: "When the transfer has been completed to the beneficiary's bank, the latter is indebted to the beneficiary to the extent of the value of the payment accepted."

80. Mr. GREGORY (United Kingdom) said he was not certain that the Saudi Arabian suggestion did not introduce an entirely new concept into the article.

81. He had some misgivings about amending article 17, as suggested by the Finnish observer, because he was not sure how the change related to the concept of acceptance by the beneficiary's bank. In that connection, he said that the beneficiary's bank was obligated, under article 9(1), once a payment order received had been accepted, to place the funds at the disposal of the beneficiary while, under article 17(1), it became indebted to the beneficiary. Both those cases must, of course, refer to the right beneficiary, the one specified in the payment order.

82. Upon acceptance by the beneficiary's bank, as the Law currently stood, the beneficiary's bank then owed the money to the correct beneficiary and the ways in which the bank could accept the payment order were set out in articles 8(1)(b) and 8(1)(c). Neither of those provisions had anything to do with crediting an account or actually handling the money, elements that would have to follow acceptance.

83. If, after acceptance, the bank then credited the wrong beneficiary, the real beneficiary was entitled to the money under the law governing the relationship between the beneficiary and his bank. If the Commission said that the transfer was not complete until the bank had actually credited the right beneficiary, that would give rise to difficulties with regard to other provisions of the Model Law, where reliance was placed on the concept of the transfer ending upon acceptance.

84. All in all, he thought that the Commission would have to be very careful if it decided to proceed along the lines suggested by the observer for Finland.

85. Mr. FELSENFELD (United States of America) said he thought that, as it was currently drafted, the Model Law was unworkable. It should be amended along the lines of the Nigerian and Finnish suggestions.

86. In the case of article 17, the provision would be greatly improved if it was decided to include wording to the effect that the beneficiary must be the beneficiary originally designated, and that the transfer was to the extent of the payment received.

87. With respect to the point raised by the representative of Singapore concerning the difficulties connected with the word "completion", he thought that, when paragraph 1 of article 17 was read in conjunction with paragraph 2, it became clear that it referred to the duties of the banking system and that discharge referred to quite another matter. However, it might be possible to meet the concern expressed by amending paragraph 1 to read: "A credit transfer is completed when the funds are placed at the disposal of the beneficiary."

The meeting rose at 5.15 p.m.